

Consideration of preliminary adoption of amendments to 312 IAC 6, which governs navigable waters, to address the use of aerators; Administrative Cause No. 09-188W

During the September 2009 meeting, the Natural Resources Commission gave preliminary adoption to new rules to help address the use of aerators on public freshwater lakes. At that time, the Commission asked the DNR to also consider the application of aerator standards to public waters other than public freshwater lakes. For consideration here as to preliminary adoption are concepts to address the use of aerators on navigable waters. The proposed concepts parallel those given preliminary adoption to public freshwater lakes but with adjustments intended to incorporate the physical and legal differences between public freshwater lakes and navigable waters, very similarly to how those differences have been incorporated by the Commission for structures such as piers. Although the agency has not yet experienced major regulatory issues concerning the use of aerators on navigable waters, the experience in other regulatory contexts is that challenges on public freshwater lakes are often later visited upon navigable waters. The adoption of these amendments can help the agency anticipate future challenges and stay ahead of the controversy. The amendments are recommended for preliminary adoption.

TITLE 312 NATURAL RESOURCES COMMISSION

Proposed Rule
LSA Document #10-

DIGEST

Amends 312 IAC 6 governing navigable waters to define and establish standards for a general license to place an aerator. Clarifies that an aerator, which is not authorized by a general license, must not be placed in a navigable waterway except upon a person's prior receipt of an individual license. Effective 30 days after filing with the Publisher.

312 IAC 6-2-2.3; 312 IAC 6-4.3-1; 312 IAC 6-4.3-2; 312 IAC 6-8-1

SECTION 1. 312 IAC 6-2-2.4 IS ADDED TO READ AS FOLLOWS:

312 IAC 6-2-2.3 "Aerator" defined

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 14

Sec. 2.3 "Aerator" means a mechanical device placed within a navigable waterway that is used to accomplish any of the following:

(1) Increase the amount of dissolved oxygen in the water.

(2) Increase the decomposition of organic materials.

(3) Alter water flow or circulation.

(4) Reduce icing.

(5) Enhance audio or visual enjoyment by bubbling or spraying water.

(Natural Resources Commission; 312 IAC 6-2-2.3)

SECTION 2. 312 IAC 6-4.3-1 IS ADDED TO READ AS FOLLOWS:

312 IAC 6-4.3-1 Application to aerators on navigable waterways

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 14-15; IC 14-26-2

Sec. 1 This rule establishes standards for the placement of an aerator on a navigable waterway. *(Natural Resources Commission; 312 IAC 6-4.3-1)*

SECTION 3. 312 IAC 6-4.3-2 IS ADDED TO READ AS FOLLOWS:

312 IAC 6-4.3-2 General license to place and maintain qualified aerators

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 14-15; IC 14-26-2

Sec. 2. (a) This section establishes terms for a general license to place and maintain an aerator on a navigable waterway other than Lake Michigan.

(b) A person who acts under this section is not required to complete an application or to obtain a written license from the department under IC 14-29-1 and this article. A person who wishes to place or maintain an aerator, which does not qualify under this section, must obtain a written license in advance of placement.

(c) To qualify for the general license, a person must satisfy each of the following requirements:

(1) Limit operation of the aerator to March through October.

(2) For March, post and maintain a sign at the site of the aerator which does each of the following:

(A) States “beware thin ice” in black lettering clearly visible to an approaching person.

(B) Includes a standard illustration in black for thin ice, upon a reflective yellow background, within a black triangle.

(C) Substantially conforms to the following illustration:



(3) Limit the effects of the aerator to a distance which does not exceed the lesser of the following:

(A) one hundred (100) feet from the ordinary high watermark of the navigable waterway;

(B) one-quarter (1/4) of the width of the waterway; and

(C) the boundaries of the person’s riparian zone.

(4) Operate the aerator to accomplish both of the following:

(A) minimize the disturbance of bottom sediments; and

(B) not diminish water clarity.

(5) Operate the aerator so it does not unduly infringe on the recreational usage of the navigable waterway by adjacent landowners or the public.

(6) Operate the aerator so that it does not remove more than six hundred twenty-five (625) square feet of aquatic vegetation.

(7) Cause the aerator to be the following:

(A) readily inoperable or removable.

(B) secure from movement caused by water currents, wind, or similar factors. (*Natural Resources Commission; 312 IAC 6-4.3-2*)

SECTION 3. 312 IAC 6-8-1 IS AMENDED TO READ AS FOLLOWS:

312 IAC 6-8-1 Application to Lake Michigan permanent structures

Authority: IC 14-10-2-4; IC 14-28-3-2; IC 14-29-1-8

Affected: IC 14-28; IC 14-29-1

Sec. 1. (a) This rule establishes standards for determining whether to grant approval for the placement of a permanent structure in Lake Michigan under IC 14-29-1.

(b) If the permanent structure is a marina, approval must be obtained under 312 IAC 6-4 in addition to this rule.

(c) As used in this rule, "permanent structure" means a:

- (1) marina;
- (2) seawall;
- (3) breakwater;
- (4) detached breakwater;
- (5) jetty;
- (6) boat launch;
- (7) "z" wall;
- (8) binwall;
- (9) sinusoidal wall;
- (10) bulkhead;
- (11) groin;
- (12) grout tube;
- (13) cable;
- (14) pipeline;
- (15) wharf;
- (16) pier;
- (17) piling;
- (18) rock revetment;
- (19) aerator; or**
- ~~(19)~~ **(20)** similar structure.

(Natural Resources Commission; 312 IAC 6-8-1; filed Jan 23, 2001, 10:17 a.m.: 24 IR 1612; readopted filed Jul 28, 2003, 12:00 p.m.: 27 IR 286; readopted filed Sep 28, 2009, 11:57 a.m.: 20091021-IR-312090152RFA)